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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 30 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting and computer services firm. It seeks to employ the beneficiary permanently in the United States as a senior analyst/ project manager, Informatica, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that it has had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition as the petitioner had filed for multiple beneficiaries and could not establish its ability to pay all of its sponsored workers. The director denied the petition accordingly.

On appeal, the petitioner submits additional evidence and asserts that it has the ability to pay the beneficiary's proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) further states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the

> organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has had the continuing financial ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on January 23, 2006, which establishes the priority date. The alien identified in the labor certification filed with the visa petition is a substitute for the original beneficiary.[1] The proffered wage as stated on Part G of the ETA Form 9089 is $110,000 per year. The ETA Form 9089, signed by the beneficiary on July 10, 2007, does not indicate that he had worked for the petitioner, however subsequent evidence indicates that the petitioner employed him beginning in 2007.

Part 5 of the I-140, Immigrant Petition for Alien Worker, filed on July 16, 2007, states that the petitioner was established in 2001, claims a gross annual income of nine million dollars and currently employs 90 workers.[2]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

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[1] The regulation at 20 C.F.R. § 656.11 states the following:

> Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Because the visa petition was filed before the deadline implementing the regulatory change, the substitution was accepted.

[2] ETA Form 9089 states that the petitioner employed 20 individuals as of the filing date of the labor certification, January 23, 2006.

In support of its ability to pay the proffered wage of $110,000 the petitioner has provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2006 and copies of its U.S. Income Tax Return for an S Corporation for 2007 and 2008 to the underlying record and on appeal. They reflect that its fiscal year is a standard calendar year. Initially structured as a C Corporation, the petitioner elected to become an S corporation on January 1, 2007. The tax returns contain the following information:

Year	2006	2007	2008
Net Income[3]	$ 175,578	$177,484	$ 211,398
Current Assets	$ 974,386	$776,374	$1,530,645
Current Liabilities	$ 762,383	$541,226	$1,654,845
Net Current Assets	$ 212,003	$235,148	-$ 124,200

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year

[3] For a C corporation, USCIS uses the figure shown on line 28 (taxable income before net operating loss deduction and special deductions). This amount is used as because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. For 2007 and 2008, the petitioner was structured as an S corporation. Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2007, 2008) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 18 in 2007 and 2008.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[5]

In addition to tax returns, the petitioner also submitted copies of Wage and Tax Statements (W-2s) issued to the beneficiary by the petitioner. They indicate the following amounts paid:

Year	Wages Paid	Difference between wages paid and the proffered wage
2006	none	$110,000 less
2007	$32,384.57	$77,615.43 less
2008	$85,796.37	$24,203.63 less

The petitioner additionally submitted copies of bank statements covering January 2006 and March through December 2006, 2007 and January through August 2008, as well as copies other employees' W-2s and payroll records.

The director denied the petition on January 16, 2009, noting that the petitioner had filed at least 80 additional Form I-140 petitions since January 23, 2006. The director specifically requested that the petitioner submit evidence related to the petitioner's multiple petitions filed since January 2006. In response, the petitioner identified only 20 petitions.[6] The director determined that the petitioner had the burden to demonstrate that it could pay the respective proffered wages to each sponsored beneficiary from each I-140 beneficiary's priority date until each beneficiary obtains permanent residence. It is additionally noted that the petitioner would also be obligated to pay each H-1B beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In this case, the director noted that the record lacked reliable information as to wages paid to all the other sponsored beneficiaries, priority dates, employment status and evidence that the petitioner could pay all of the proffered wages. The director specifically noted that in 2006, the petitioner's net income was $175,578, and its net current assets as indicated on Schedule L of the corporate tax return were $212,003. The director concluded that neither its net income nor its net current assets would provide enough funds to cover the proffered wage on the instant petition, as well as the proffered wage on at least 80 additional I-140 petitions filed since January 23, 2006. The director made similar observations for 2007 after taking into consideration the $32,384.57 that the beneficiary received in wages from the petitioner.

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[5] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

[6] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

With respect to the copies of the petitioner's bank statements, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its corresponding tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

In determining a petitioner's ability to pay a given wage, and before examining a petitioner's net income or net current assets during a given period, USCIS will first review whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. As noted above, the petitioner must demonstrate that it had the ability to pay the beneficiary's full proffered wage in 2006 and had the ability to cover the $77,615.43 difference between the actual wages paid in 2007 and the proffered wage of $110,000. In 2008, it must show the ability to cover the $24,203.63 difference between the actual wages paid and the proffered wage.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.

The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Here, the petitioner's ability to pay the instant beneficiary must be considered within the context of the petitioner's sponsorship of other beneficiaries. Current USCIS records, as of March 26, 2011, reflect that the petitioner has filed at least 871 petitions since 2001, including both Form I-129 petitions, with the remaining approximately 180 being Form I-140 petitions. Although the petitioner has submitted some information relevant to other workers, it is not sufficient to demonstrate proffered wages, the payment of wages, employment status and priority dates in order to establish the petitioner's total wage obligation and its cumulative ability to pay the proffered wage of each respective sponsored worker. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, despite its relatively large net

income and net current assets, the petitioner's ability to pay this beneficiary has not been established, because insufficient accounting has been provided relevant to clearly demonstrate that it had the ability to pay this beneficiary's proposed $110,000 per year wage offer or the difference between actual wages paid and the proffered wage out of either net income or net current assets in addition to all other sponsored wage offers of all beneficiaries. As the petitioner failed to provide specifics of each sponsored worker, we cannot accurately calculate the petitioner's total wage obligation. The burden of proof and persuasion is ultimately with the petitioner.

The petitioner asserts that it employs over 100 individuals. Therefore it maintains that a statement from its financial officer submitted on appeal should be sufficient as evidence of its ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation also provides that: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) In this case, the petitioner claimed that it had 20 employees when it filed the ETA Form 9089 and 90 employees when it filed the Form I-140.[7] While it may employ 100 or more workers in later years, it did not employ 100 or more workers from the time of the priority date onward. Further, given the record as a whole and the petitioner's numerous Form I-129 H-1B and Form I-140 petitions filed, we find that discretion to accept a letter from the financial officer need not be exercised.

The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of his December 10, 2007 priority date.

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful

[7] Whether both numbers are accurate is unclear. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the present matter, as set forth above, the petitioner has not established that the petition merits approval under *Sonegawa.* As noted above, although the petitioner's tax returns show substantial growth in gross receipts and wages paid,[8] the petitioner must demonstrate that it can pay the proffered wage of all sponsored workers, as well as the instant beneficiary's proffered salary. As the petitioner's total rate of filing for all petitions greatly exceeds its claimed number of employees, and the petitioner has not submitted evidence of its total wage obligation, we cannot conclude that this case warrants approval under its overall circumstances. Further, no unusual business circumstances or reputational factors have been shown to exist in this case that parallel those in *Sonegawa,* nor has it been established that the filing year was an uncharacteristically unprofitable year for the petitioner within a framework of profitable years.

Based on a review of the underlying record and the evidence and argument submitted on appeal, in view of the multiple petitions filed, it is not concluded that the petitioner has established its continuing financial ability to pay the proffered wage

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[8] Although the petitioner cites to its total wages paid, the partially complete response to the director's request for evidence shows that most of its employees are paid approximately $100,000. For 80 sponsored workers (a list of over 90 was submitted on appeal), this would create a wage burden of eight to nine million dollars without even considering any wage obligations to H-1B employees.